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Supreme Court of the United States

OCTOBER TERM, 1947

No. 627

ESTATE OF MARTHA W. COLLINS, Deceased, Seward
B. Collins and Bank of New York, Executors,
. Petitioners,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

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B. Collins and Bank of New York, Executors,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice of the United States and
the Associate Justices of the Supreme Court of the United
States:*

Your Petitioners, the Estate of Martha W. Collins, deceased, Seward B. Collins and Bank of New York, Executors, respectfully show:

Summary Statement of the Matter Involved

The essential facts, as stipulated by the parties (R. 11-16, 47)¹ and found by The Tax Court of the United States (R. 6) may be summarized as follows:

The decedent created an *inter vivos* trust dated July 2, 1919, amended January 31, 1922, which was subject to revo-

¹ The references "R." are to the Appendix in the Circuit Court of Appeals, a certified copy of which is filed herewith.

cation by the decedent during the lifetime of her husband and became irrevocable on September 11, 1927 on his death (R. 12, 13).

The trust instrument (R. 29-39), as amended (R. 40-45), provided that the trust income was to be paid to decedent during her lifetime, or to others if she remarried (which event never occurred). At decedent's death the principal of the trust was to be divided into three parts, one-half to be set aside for her husband and one-quarter to be set aside for each of her two named sons (R. 40-41), the income from each such share to be paid to the named son or husband for life, and, in the case of each son's share, the remainder to his surviving children and their issue; if none, then to such persons as the son should by Will appoint, or in default of appointment, to such son's then surviving wife, if any, and if none, to the other son or his issue (R. 41-42). If decedent's husband predeceased decedent, his share was to become part of the shares of the two sons (R. 43), and if either son predeceased the decedent his share was, at the decedent's death, to be paid to his issue, *per stirpes*, or, if he left no issue surviving him, to be added to the share for the surviving son (R. 42). In the event both the decedent's husband and sons predeceased her, then upon her death the principal of the trust was to be distributed as the decedent by her Will might appoint (R. 44). Since one of the decedent's sons survived the decedent (R. 15) this last provision of the trust instrument never became operative.

Decedent's husband died September 11, 1927, and one son died without issue surviving him on September 27, 1940 (R. 14). Therefore, the decedent's surviving son became entitled to have added to the principal of his trust the parts which would otherwise have been set aside for his father and brother, and, since the death of the decedent, the entire principal of the trust has been held in trust for the surviving son (R. 14).

Decedent died a resident of New Canaan, Connecticut, on October 4, 1941, leaving a last Will and Testament (R. 17-28) which was duly admitted to probate by the Pro-

bate Court of the District of New Canaan, Connecticut (R. 11). At the time of her death decedent was 71 years of age and her surviving son was 42 years old (R. 13). He was married, and his wife was 48 years of age. They adopted a child on January 3, 1942, who had been born May 18, 1939 and who is still living (R. 15). Petitioners filed an estate tax return for the estate (R. 11-12).

Respondent, claiming that the trust was includible in the decedent's gross estate under Section 811(c) of the Internal Revenue Code as a transfer intended to take effect at death (R. 7-8), subsequently determined a deficiency in estate tax of \$557,258.15 (R. 11-12), substantially all of which, before deduction of any credit for state taxes, was attributable to the inclusion in the gross estate of \$889,650.84, the value on the optional valuation date of the principal of the trust created by the decedent (R. 12, 15). No question of contemplation of death is involved (R. 16).

The actuarial value for estate tax purposes of decedent's power to appoint the trust corpus if she survived her surviving son was \$72,522.64 at her death (R. 47).

Petitioners sought a redetermination of the deficiency by The Tax Court and thereafter paid \$382,357.97, representing the amount determined to be due by respondent after certain credits for state taxes (R. 12, 15-16).

Petitioners contended before The Tax Court that no part of the corpus of the trust should be included in the gross estate, or, in the alternative, if any part of the value of the trust should be included, such value should be \$72,522.64 and no more. The Tax Court held that the case was controlled by the decision of this Court in *Fidelity-Philadelphia Trust Co. (Stinson Estate) v. Rothensies*, 324 U. S. 108 (1945), and, therefore, that the entire value of the trust corpus was properly included in the estate. After adjustments by agreement between the parties (R. 16), The Tax Court entered decision for petitioners for an overpayment of \$7,588.02 (R. 10).

On petition to review (R. 2, 4), the Circuit Court of Appeals affirmed in the following *per curiam* opinion:

"Affirmed on authority of *Commissioner v. Bayne's Estate*, 155 Fed. (2) 475 (C. C. A. 2)." (R. 56)

The opinion of The Tax Court (R. 5-9) is reported at 5 T. C. 1276. The *per curiam* opinion of the Circuit Court of Appeals (R. 56) is reported at 164 F. 2d 276.

Jurisdictional Statement

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Section 1141(a) of the Internal Revenue Code, 53 Stat. 164, and Section 240(a) of the Judicial Code, as amended (Act of March 3, 1891, c. 517, § 6, 26 Stat. 828; Act of March 3, 1911, c. 231, § 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, § 1, 43 Stat. 938; U. S. C. Title 28, § 347). The judgment of the Circuit Court of Appeals was entered on November 26, 1947 (R. 57).

Questions Presented

1. Whether the decedent made a transfer, by an *inter vivos* trust, intended to take effect in possession or enjoyment at or after her death within the meaning of Section 811(c) of the Internal Revenue Code by reason of the fact that the trust gave decedent a power to appoint by will on the happening of certain contingencies before her death, which contingencies never occurred.

2. If there was such a transfer, whether the entire value of the corpus of the trust should be included in decedent's gross estate for estate tax purposes or whether the amount to be so included should be limited to \$72,522.64, the actuarial value of the possibility that the decedent might acquire a power to appoint the trust corpus.

Statute and Regulations Involved

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*, pp. 11-12.

Specification of Errors to be Urged

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that any part of the value of the corpus of the trust estate should be included in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death under Section 811(c) of the Internal Revenue Code.

(2) In failing to hold that if any part of the value of the corpus of the trust should be included in decedent's gross estate such value is \$72,522.64 and no more.

(3) In failing to reverse the decision of The Tax Court of the United States.

Reasons Relied on for Allowance of the Writ

1. One question presented in this case and decided by the Circuit Court of Appeals is before this Court in *Commissioner v. Estate of Spiegel*, 159 F. 2d 257 (C. C. A. 7th 1946), certiorari granted 331 U. S. 798 [No. 52], and *Commissioner v. Estate of Church*, 161 F. 2d 11 (C. C. A. 3rd 1947), certiorari granted 331 U. S. 803 [No. 96].

The Circuit Court of Appeals in the instant case was of the opinion that this case was governed by its opinion in *Commissioner v. Bayne's Estate*, 155 F. 2d 475 (1946). There, the income from a trust was payable to the grantor for life, remainder in equal shares, *per stirpes*, to the then surviving children of the grantor and the issue of deceased children or, in default thereof, in equal shares, *per stirpes*, to the surviving brothers and sister of the grantor and the issue of such of them as may have predeceased him. There was a possibility that the property might revert by operation of law to the estate of the grantor after the grantor's death if his descendants and brothers or sister and their descendants should fail. The Circuit Court of Appeals, relying on *Fidelity-Philadelphia Trust Co. (Stinson Estate)*

v. *Rothensies*, *supra*, and *Commissioner v. Estate of Field*, 324 U. S. 113 (1945), held the trust fund taxable in the grantor's estate. The Circuit Court concluded that this Court had made no distinction in the foregoing cases between reversions expressly reserved by trust instrument and reversions created by operation of law.

Since the Circuit Court in holding that the instant case is governed by the *Bayne* case has apparently made no distinction between a reversionary interest by operation of law and the possibility of acquiring a power of appointment expressly reserved by the trust instrument, the *Bayne* case and the instant case present the same issue which is now before this Court in the *Spiegel* and *Church* cases and should be decided in this case.

2. The position of respondent in the courts below is in conflict with *May v. Heiner*, 281 U. S. 238 (1930), *Morsman v. Burnet*, 283 U. S. 783 (1931), and *Hassett v. Welch*, 303 U. S. 303 (1938).

In *May v. Heiner* this Court held that a transfer in trust with income reserved by the settlor for life and remainders over was not embraced within the statutory language of the then equivalent of Section 811(c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after death. In *Hassett v. Welch* it was held that Congress did not intend to apply the amendment made to Section 302(c) of the Revenue Act of 1926 by Joint Resolution of March 3, 1931 so as to subject to estate tax transfers made prior thereto in which the settlor reserved the income to himself for life.

Similarly in the present case at the moment of her death the decedent retained no greater interest in the property than the decedents in *May v. Heiner* and *Hassett v. Welch*. She retained only a life estate. The power to appoint could only arise upon contingencies *before* her death. They never arose, and the decedent died without any interest save the life estate.

A sharp distinction should be made between this situation and the situation before the Court in the *Stinson* case

relied on by The Tax Court. In the *Stinson* case the decedent possessed at the date of her death, and actually exercised, the power to determine who the ultimate beneficiaries of the property would be in the event her daughters should at any time after her death die without issue. Thus, at the date of death, the decedent actually possessed and exercised the power to determine who the ultimate beneficiaries might be, and it presumptively appeared at the date of death that the property would be distributed under the power of appointment actually exercised by her.

In the present case the decedent had nothing at the time of her death other than the life estate. To hold that the mere reservation of a life estate makes the transfer taxable is contrary to *May v. Heiner* which has not been overruled.

Furthermore, before the decision in the case of *Helvering v. Hallock*, 309 U. S. 106 (1940), this Court had applied the doctrine of *May v. Heiner* to cases where the grantor had reserved a life estate and where under the terms of the trust instrument he also had a reversionary interest by operation of law. See *Morsman v. Burnet*, 283 U. S. 783 (1931), reversing *per curiam Commissioner v. Morsman*, 44 F. 2d 902.

Any holding that the transfer in the instant case is taxable is in conflict with *May v. Heiner*, *Morsman v. Burnet*, and *Hassett v. Welch*.

Indeed, the recently amended Treasury Regulations point up the conflict between the respondent's position and the above cases. By a Treasury Decision of May 1, 1946, the Regulations were amended to provide that the mere presence of a possibility of reverter, or its assumed equivalent, the possibility of acquiring a power of appointment, is not sufficient to require inclusion of the trust property in a decedent's gross estate. T. D. 5512 (Reg. 105, Section 81.17, as amended by T. D. 5512, 1946-1 Cum. Bull. 264, see Appendix, *infra*, pp. 11-12). To be includible under present Treasury Regulations the transfer must be conditioned on survivorship of the grantor. Despite the reaffirmation of this test in the current Regulations, the Commissioner nevertheless still contends that if (in addition

to the presence of a possibility of reverter or a possibility of acquiring a power of appointment) the decedent retains a life estate, the property is includible in the gross estate even though the transfer was made prior to the Joint Resolution of March 3, 1931 referred to in *Hassett v. Welch*, *supra*, and even though apart from the life estate the transfer would not be includible in the gross estate because not conditioned on survivorship. Such is the situation in the instant case. Had not the decedent retained a life estate, the case at bar would fall squarely within Example 2 of Regulations 105, Section 81.17, as amended by T. D. 5512 (see Appendix, *infra*, p. 12), and, in accordance therewith, no contention would now be made that the property is includible in the gross estate.

3. The decision below is also inconsistent with the decisions of this Court in *Smith v. Shaughnessy*, 318 U. S. 176 (1943); and *Robinette v. Helvering*, 318 U. S. 184 (1943).

In the *Smith* and *Robinette* cases, this Court held that transfers in trust were subject to gift tax as completed gifts during lifetime despite the existence in each case of a possibility of reverter or a possible disposition of the property by the settlor's will. The possibility of reverter in the *Smith* case could be valued by actuarial methods, and its value was excluded from the taxable gift; the possibility that the trust property might pass under the donor's will in the *Robinette* case was so remote that it could not be valued by actuarial methods, and the full value of the transferred property less the value of the life estate reserved by the settlor was subjected to the gift tax. The converse of the principle of the *Smith* and *Robinette* cases should apply under the estate tax, and to the extent that the transfer is a completed gift during lifetime, it should not be regarded as a transfer which takes effect at or after death—that is to say, only the actuarial value of the possibility that the decedent might acquire a power to appoint should be included in the taxable estate.

Prayer for Writ

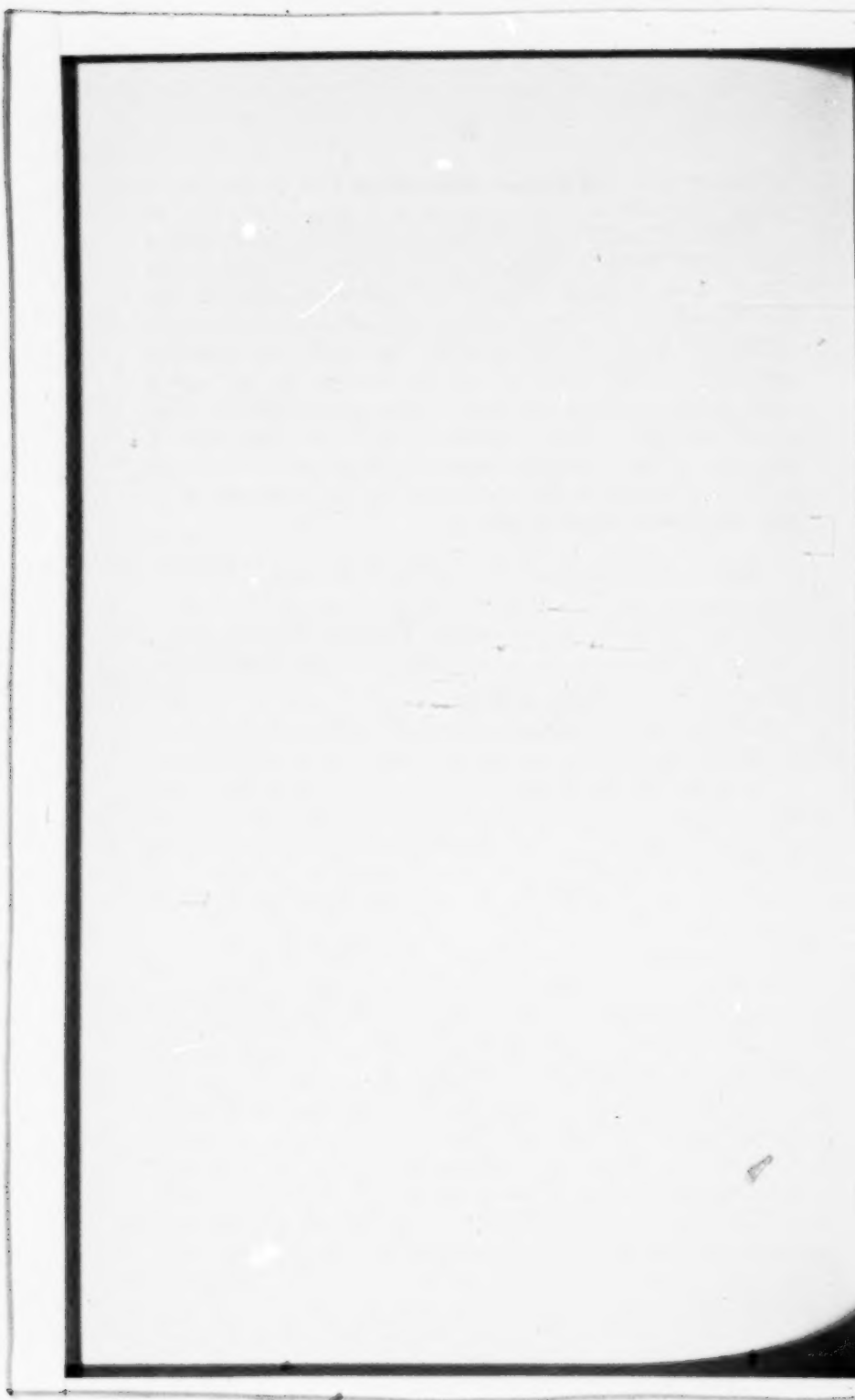
Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y., February 24, 1948.

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Appendix

INTERNAL REVENUE CODE:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

• • • • •

(c) *Transfers in contemplation of, or taking effect at death.* To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, • • • except in case of a bona fide sale for an adequate and full consideration in money or money's worth. • • •

• • • • •

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a bona fide sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

• • • • •

Example (2). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 627

ESTATE OF MARTHA W. COLLINS, DECEASED, SEWARD
B. COLLINS AND BANK OF NEW YORK, EXECU-
TORS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 5-9)¹ is reported at 5 T. C. 1276. The *per curiam* opinion of the Circuit Court of Appeals (R. 56) is reported at 164 F. 2d 276.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 26, 1947. (R. 57.)

¹ Record references are to the separately bound volume which is entitled as an Appendix filed with the Circuit Court of Appeals.

The petition for a writ of certiorari was filed February 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below erred in affirming the Tax Court's decision that the *inter vivos* trust created by the decedent was a transfer intended to take effect in possession or enjoyment at or after her death and was, therefore, a taxable transfer for estate tax purposes under Section 811 (c) of the Internal Revenue Code.

2. If not, whether the court below erred in affirming the Tax Court's decision that \$889,650.84, the full value of the trust property, and not just \$72,522.64, the value of decedent's contingent general power of appointment, is includible in decedent's gross estate.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of

any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.17 [as amended by T. D. 5512, 1946-1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.* A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if

his right or interest consists solely of an estate for his life. * * *

STATEMENT

The pertinent facts, which were all stipulated and found by the Tax Court as stipulated (R. 6), may be summarized as follows:

Seward B. Collins and the Bank of New York, petitioners herein, are the duly appointed, qualified and acting executors of the last will and testament of Martha W. Collins, deceased, who died a resident of New Canaan, Connecticut, on October 4, 1941. (R. 11.) Petitioners duly filed an estate tax return for the estate of the decedent and the Commissioner subsequently determined a deficiency in estate tax of \$557,258.15 with the qualification that the amount thereof in excess of \$382,357.97 might be eliminated by credit for state inheritance, legacy, succession and estate taxes upon submission of proper evidence of payment. (R. 11-12.) Petitioners paid the \$382,357.97 (R. 15-16) and, after adjustments by agreement between the parties for state taxes and for counsel fees and expenses incurred in the present proceeding (see R. 16), the Tax Court entered decision for petitioners for an overpayment of \$7,588.02 (R. 10). The amount of tax in controversy (\$382,357.97 minus \$7,588.02, or \$374,769.95) resulted from the inclusion in the decedent's gross estate of \$889,650.84 (R. 12), which petitioners concede is the value one year after decedent's

death of a trust decedent created during her lifetime (R. 15).²

The trust involved was created by decedent on July 2, 1919, naming the Bankers Trust Company as trustee. The trust was subject to modification, alteration and revocation by decedent during the lifetime of her husband, was amended on January 31, 1922, and became irrevocable on September 11, 1927, when decedent's husband died. (R. 12-13.)

At the time of the execution and amendment of the trust instrument, the decedent had living a husband, Herbert S. Collins, and two sons, Seward B. and Herbert G. Collins. The decedent was born in 1870, her husband in 1875, her son Seward in 1899 and her son Herbert in 1906. (R. 13.)

The trust instrument (R. 29-38), as amended (R. 40-45), provided that during decedent's lifetime the trust income was to be paid to her, or, if she remarried (which she did not), one-half to her and the other one-half equally to her two sons, Seward and Herbert. At decedent's death the trust principal was to be divided into three parts, one-quarter to be set aside for her son Seward, one-quarter for her son Herbert and one-half for her husband, Herbert S. Collins. (R.

² Petitioners elected to have the gross estate of the decedent valued as of one year after decedent's death (R. 11-12, 15) as authorized by Section 811 (j) of the Internal Revenue Code (26 U. S. C. 811).

40-41.) The income from each such share was then to be paid to the named son or husband for life and provision was made for disposition of each of the shares at the death of the life tenant. Article First, par. A, B and D, R. 41-43.) However, if decedent's husband, Herbert S. Collins, predeceased decedent, his share was to become a part of the shares of the two sons (Article First, par. E, R. 43), and if either of the sons predeceased the decedent his share was, at the decedent's death, to be paid to his issue, *per stirpes*, and, if he left no issue surviving him, was to be added to the trust fund created for his brother, "the surviving son" (Article First, par. C, R. 42). If decedent's husband survived her and both sons predeceased her without leaving surviving issue, decedent's husband was to receive all of the trust income for life and at his death and principal was to be paid as decedent should appoint in her will. (Article First, par. G, R. 44.) The trust instrument further provided (R. 44):

F. In the event that the said Herbert S. Collins, Seward B. Collins and Herbert G. Collins and all of them shall predecease the party of the first part [decedent], then upon the death of the party of the first part [decedent], to assign, transfer and pay over the entire principal of said trust fund to such person, persons or corporations and in such manner and proportions as the party of the first part shall, in and

by her duly executed and probated last Will and Testament, designate and appoint.

Decedent's husband, Herbert S. Collins, died September 11, 1927, and her son Herbert died on September 27, 1940, without leaving surviving issue. (R. 14.) By reason of these deaths, the shares of decedent's husband and of her son Herbert were to be added at decedent's death to the share of the son Seward and be disposed of accordingly, provided the son Seward survived decedent.

At the time of decedent's death on October 4, 1941, her son Seward was living. He was married and his wife (born in 1893) was also living. They are both still living. On January 3, 1942, they adopted a child who had been born May 18, 1939, and is still living. (R. 15.)

The value of decedent's power to appoint the trust corpus if she survived her son Seward, when adjusted for the difference in value of the trust corpus as of the optional date one year after decedent's death, was \$72,522.64 at her death. (R. 47.)

On the basis of the above facts, the Tax Court held that decedent's transfer in trust is taxable under Section 811 (c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after death and that \$889,650.84, the full value of the trust on the optional date, one year after decedent's death, is

includible in decedent's gross estate. (R. 8-9.)
The decision was affirmed on appeal. (R. 56.)

ARGUMENT

The reasons advanced by petitioners for further review of the case by this Court consist primarily of assertions that the decision below is in conflict with certain decisions of this Court. (Pet. 6-8.) The asserted conflict is not only non-existent but the case is controlled, and the decision below supported, by this Court's decision in *Fidelity Co. v. Rothensies*, 324 U. S. 108.

Here, as in the *Fidelity Co.* case, *supra*, the decedent made a transfer in trust under which she retained a life estate and a contingent general power of appointment which suspended the ultimate disposition of the trust property until her death.³ In the *Fidelity Co.* case the decedent's

³ After September 11, 1927, when the trust created by the instant decedent became irrevocable by the death of her husband, the trust income was payable to the decedent for her life, except that if she remarried part of the income was to be distributed to her two sons during her lifetime, and at her death the trust income was to be paid to the two sons for their lives, with alternative remainders and remainders over, but, if both sons predeceased the decedent, the trust property was to be distributed at decedent's death as decedent directed in her will. In the *Fidelity Co.* case, *supra*, the trust income was to be paid to the decedent for her life and at her death to her two daughters for their lives and at the death of each daughter the corpus supporting her share was to be paid to the daughter's descendants and, if the daughter died without descendants, was to be added to the share of the other daughter or of the surviving descendants of the other daughter, and,

contingent power was such that the disposition of the trust property was also suspended *after* the decedent's death but, contrary to petitioners' assertions (Pet. 6-7), that is not a valid ground for distinguishing the case. Section 811 (c) of the Internal Revenue Code (*supra*, pp. 2-3) taxes transfers intended to take effect in possession or enjoyment "at or after" the decedent's death and this Court made it clear in the *Fidelity Co.* case and in other cases (*Commissioner v. Estate of Field*, 324 U. S. 113; *Helvering v. Hallock*, 309 U. S. 106) that it is the suspension of the ultimate disposition of the trust property during the decedent's life which makes a transfer taxable under Section 811 (c), the suspension of disposition *after* the decedent's death being but an additional feature.⁴ Thus, the present case is controlled by the Court's decision in the *Fidelity Co.* case, in which it was held that Section 811 (c) required the inclusion in the decedent's gross estate of the

if both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the decedent might appoint by will.

⁴ We are not concerned here with the question of taxability under the amendments added by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, and Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, to Section 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, the source of Section 811 (c) of the Internal Revenue Code. Those amendments make a transfer taxable under Section 811 (c) solely by reason of the retention of the possession or enjoyment of, or right to, the trust income for life, but have been held inapplicable to trusts such as this, which became irrevocable in 1927. See *Hassett v. Welch*, 303 U. S. 303.

entire value of the trust property at the decedent's death. It follows that the *Fidelity Co.* decision supports, and indeed required, the affirmance by the court below of the Tax Court's decision in the instant case.⁵

Petitioners are incorrect in stating (Pet. 6-8) that the decision below is in conflict with certain other decisions of this Court involving taxability under Section 811 (c) and that the Commissioner's position in this case is in conflict with the applicable Treasury Regulations, *supra*, pp. 3-4.⁶ While the basis for the statement is not readily apparent

⁵ Petitioners erroneously assert (Pet. 5-6) that the instant case presents the same issue before this Court in *Estate of Spiegel v. Commissioner*, No. 52, 1947 Term, and in *Commissioner v. Estate of Church*, No. 96, 1947 Term. Those cases involve the question whether Section 811 (c) taxes transfers in trust under which a decedent has a possibility of reversion by operation of law, whereas the present case, like the *Fidelity Co.* case, involves a transfer in trust under which the decedent expressly retained a contingent general power of appointment, the equivalent of a possibility of reversion. Contrary to petitioners' intimations, the facts of the case are not changed because of the reliance by the court below upon its own decision in *Commissioner v. Bayne's Estate*, 155 F. 2d. 475, which involved a possibility of reversion by operation of law.

⁶ The cases cited and relied upon by petitioners are as follows: *May v. Heiner*, 281 U. S. 238; *Morsman v. Burnet*, 283 U. S. 783, which is a *per curiam* decision reversing the decision below on the authority of *May v. Heiner*, *supra*; and *Hassett v. Welch*, 303 U. S. 303, in which it was held that the 1931 and 1932 amendments, making transfers taxable solely by reason of the retention of a life estate by the decedent (See fn. 4, *supra*, p. 9), are not to be retroactively applied to transfers made prior to the amendments.

from the petition, the statement evidently has the same premise petitioners urged in the court below. That premise was that, in order to give effect to *May v. Heiner*, 281 U. S. 238, which has been interpreted as holding that the mere retention of a life estate will not support taxability under Section 811 (c) as to transfers made prior to March 3, 1931, the instant trust instrument, which provides for disposition of the trust property at the *decedent's* death, must be interpreted as if the decedent had retained the trust income for herself for the period of someone else's life and had provided for distribution of the trust property at the death of that someone else.⁷ Thus, while petitioners must concede that a transfer is taxable under Section 811 (c) if the decedent's disposition of the trust property is contingent upon his death by reason of his retention of a possibility of reversion (*Helvering v. Hallock*, *supra*; *Commis-*

⁷ That this is petitioners' position in this Court is indicated from the fact that of the several examples of taxable and nontaxable transfers given in the applicable Treasury Regulations (Treasury Regulations 105, Sec. 81.17, as amended by T. D. 5512, 1946-1 Cum. Bull 264) the only one petitioners quote is as follows (Pet. 12) :

"The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section."

sioner v. *Estate of Field, supra*) or of its equivalent, a contingent general power of appointment (*Fidelity Co. v. Rothensies, supra*), petitioners nevertheless assume that such transfers are not taxable if the decedent also retained a life estate. None of the decisions cited by petitioners as in conflict with the decision below supports such an anomalous assumption, while, on the other hand, the Court's decision in the *Fidelity Co.* case plainly reflects that the assumption is unwarranted. In that case, as already noted, the decedent also retained a life estate in addition to a contingent general power of appointment and the Court predicated its decision, not on a hypothetical case, but upon the fact that under the terms of the trust instrument there involved, as here, the beneficiaries were required to survive the decedent in order to take.*

* The general language of the applicable Treasury Regulations (*supra*, pp. 3-4) is consistent with this Court's decision in the *Fidelity Co.* case, *supra*. In addition, one of the examples given in those Regulations covers the situation involved in the *Fidelity Co.* case in the following language:

"*Example (5).*—The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both

No reason for the granting of certiorari is presented by petitioners' assertion (Pet. 8) that the decision below is inconsistent with the decisions of this Court in *Smith v. Shaughnessy*, 318 U. S. 176, and in *Robinette v. Helvering*, 318 U. S. 184. Those cases involved gift tax, not estate tax, as applied to situations where the donor had transferred property in trust and retained a possibility of reversion. The transfers were considered complete for gift tax purposes, except for the value of the donor's reversionary interest, and petitioners argue that the same rule should apply with respect to the estate tax, with the result that only the value of this decedent's contingent general power of appointment should be included in her gross estate. The complete answer to this argument is that this Court has not applied the rule of the gift tax cases to estate tax cases under Section 811 (c) and, on the contrary, has affirmatively held that the entire value of the trust property at the decedent's death is includible in the decedent's gross estate when the decedent's transfer in trust was one under which the decedent retained a possibility of reversion or contingent general power of appointment contingent upon his death. *Fidelity Co. v. Rothensies*, *supra*; *Commissioner v. Estate of Field*, *supra*.

beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate."

CONCLUSION

The decision below is correct and involves no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH, 1948.